

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GINO MASSIELLO,	:	
Plaintiff	:	
	:	
v.	:	Civil Action No. 3:03 CV 2185(CFD)
	:	
ROADWAY EXPRESS, INC,	:	
Defendant.	:	

RULING ON MOTION TO STRIKE PLAINTIFF’S JURY DEMAND

Plaintiff Massiello initially brought this employment discrimination suit in the Connecticut Superior Court. It was removed to this Court by the defendant on December 18, 2003. Massiello then twice amended his complaint. A motion to amend the complaint was filed on April 12, 2004, and it was granted on November 4, 2004. An answer to that complaint was filed on April 15, 2004, prior to granting of the motion to amend. The second amended complaint was filed on April 22, 2005.¹ That complaint did not assert any additional causes of action. Rather, it withdrew three state law causes of action that were contained in the prior complaint. An answer was filed to the second amended complaint on May 12, 2005. Massiello, for the first time in this law suit, filed a demand for a trial by jury on March 24, 2005. Defendant Roadway Express has moved to strike that jury demand, arguing that it was untimely because it was not filed within ten days of its answer filed on April 15, 2004.

Rule 38(b) of the Federal Rules of Civil Procedure provides that:

[a]ny party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the

¹ A motion to amend the complaint was filed on March 24, 2005. The Court approved that motion on April 22, 2005, and the second amended complaint was filed on the same day.

commencement of the action and not later than 10 days after the service of the last pleading directed to such issue

Fed. R. Civ. P. 38(b). In removal cases, Rule 81(c) establishes specific rules for the carrying over of a jury demand from the state filings, or for making a jury demand where all the “necessary pleadings” have been previously filed in state court. Rule 81, however, does not apply when the “necessary pleadings” have not been filed prior to the time of removal. In such a case, as here, Rule 38 applies. See Miller v. Merrill Lynch Credit Corp., 2004 U.S. Dist. LEXIS 6239 *2 n.1 (D.Conn. April 12, 2004); Wysowski v. Sitmar, 127 F.R.D. 446, 448 (D.Conn.1989); McRae v. Arabian American Oil Co., 34 F.R.D. 513, 514 (S.D.N.Y. 1964).

“In this Circuit, amendments to the pleadings revive the right to a jury trial only if the amendments involve new issues or change the original issues.” Sunenblick v. Harrell, 145 F.R.D. 314, 316-317 (S.D.N.Y. 1993), citing Lanza v. Drexel & Co., 479 F.2d 1277, 1310 (2d Cir. 1973). Defendant correctly points out that the amended complaint of April 22, 2005 did not create new issues that would trigger the commencement of a new ten day period for the plaintiff to file a jury demand. However, the defendant’s April 15, 2004 answer was ineffective in starting the ten day period of Rule 38(b) at that time because it was submitted prior to the Court’s order granting the plaintiff’s motion to amend on November 4, 2004.

To be effective, the jury demand needed to be filed at any time before or within ten days of the “last pleading.”² Because the jury demand was filed prior to the second amended complaint and to the answer to that complaint, it is a permissible demand under Rule 38.

²Massiello did file a Reply on June 9, 2005 to the defendant’s May 12, 2005 Answer. While replies are required in Connecticut state court if special defenses are raised in the answer, see Conn. Prac. Book § 10-6, they are not permitted in federal court unless ordered by the Court. No such order entered here. See Fed. R. Civ. P. 7.

Additionally, the Court find it appropriate to exercise its discretion pursuant to Fed. R. Civ. P. 39(a) to permit a trial by jury in this case. The Court has considered the following factors: “(1) whether the action is traditionally tried by a jury, (2) whether the parties have proceeded on the assumption that there would be a jury trial, and (3) whether granting the late demand would cause undue prejudice for the defendant.” Miller, 2004 U.S. Dist. LEXIS 6239 at *3. This type of case is traditionally tried before a jury, and although the defendant may have expected a bench trial in this case, such reliance is insufficient given the lack of demonstrated undue prejudice to the defendant. Finally, the trial has not yet been scheduled.

The defendant’s motion to strike plaintiff’s jury demand [**Doc. # 32**] is **DENIED**.

SO ORDERED this 23rd day of March, 2006, at Hartford, Connecticut.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE